

**IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH**

**Criminal Appeal No. 934-SB of 1999**

Date of decision: 8<sup>th</sup> February, 2010

Deepak and another

... Appellants

Versus

State of Haryana

... Respondent

**CORAM: HON'BLE MR. JUSTICE KANWALJIT SINGH AHLUWALIA**

Present: Mr. Sudhir Sharma, Advocate for the appellants.  
Mr. Sunil Nehra, Sr. Deputy Advocate General, Haryana  
for the State.

**KANWALJIT SINGH AHLUWALIA, J. (ORAL)**

Present appeal has been filed by Deepak and Bobby alias Satish sons of Ram Sarup. The Court of Additional Sessions Judge, Sirsa vide its judgment dated 15<sup>th</sup> September, 1999 held them guilty of offence under Section 304 Part-II IPC and sentenced them to undergo rigorous imprisonment for seven years.

Complainant Lavkesh Kumar has also filed Criminal Revision No.350 of 2000, in which no notice was issued and the same was ordered to be heard along with present appeal. In the revision petition, it has been prayed that the acquittal of the accused respondents under Section 302 be set aside and sentence of fine should also be imposed.

By this common order, Criminal Appeal No.934-SB of 1999 and Criminal Revision No.350 of 2000 shall be decided together.

FIR, in the present case, was lodged by Lavkesh Kumar PW-5. He had made statement Ex.PF to Charanjit Singh SI PW-8.

Lavkesh Kumar was engaged in the business of repairing Air Conditioners and Refrigerators. He was tenant in Shop No.15 belonging to Municipal Committee. His brother Sushil Kumar was employed at Doordarshan, Sirsa. On 30<sup>th</sup> May, 1998 at about 5.00 p.m. Sushil Kumar came on his scooter to the shop of his brother Lavkesh Kumar complainant and parked his scooter in the street. Bobby alias Satish son of Ram Sarup accused hurled abuses to Sushil Kumar and asked him to remove the scooter. The complainant asked Sushil Kumar to remove the scooter. Sushil Kumar agreed to remove the scooter, but objected to the abuses hurled by Bobby alias Satish accused. Accused Bobby alias Satish hurled more abuses, upon which Sushil Kumar gave a slap to Bobby alias Satish. Subhash Chander and Gurdeep, who were running shops in the neighbourhood, were attracted at the spot and they got Sushil Kumar and Bobby alias Satish separated. At about 6.00 p.m., Bobby alias Satish accompanied by his brother Deepak alias Bittu came there. They lifted Sushil Kumar and threw him on the road. After catching hold of his hair, they struck his head on the road number of times. Subhash Chander, Gurdeep and the complainant rushed to the spot and rescued Sushil Kumar. The accused fled away from the spot. Sushil Kumar became unconscious. After arranging a conveyance, Sushil Kumar was brought to Civil Hospital, Sirsa for treatment, where Doctor after examination declared him dead.

A grievance was made that Sushil Kumar suffered head injury and same was caused by Bobby alias Satish and Deepak alias Bittu, as they had struck his head on the road after catching hold of his hairs. Therefore, they had caused death of Sushil Kumar, for which they should be punished.

The above said FIR was investigated and report under Section 173 Cr.P.C. was submitted. On 30<sup>th</sup> July, 1998, the appellants

were charged for offence under Section 302 read with section 34 IPC. Dr.Joginder Singh PW-1 had conducted autopsy on the dead body of Sushil Kumar on 31<sup>st</sup> May, 1998 along with Dr.N.K. Mittal. On the dead body, following two injuries were found:

1. There was present an abraded contusion of the size 2 cm x 1 cm over right side of forehead 1 cm above right eyebrow near the mid line. On dissection, there was present infiltration of blood in sub-cutaneous tissues.
2. There was present an abrasion of size .5 cm x .2 cm over left side of nose just below the bridge of nose.

On dissection of the skull, extra dural haemotomma was found. This witness also found fracture of lower part of 10<sup>th</sup> rib. The cause of death, according to the Doctor, was haemorrhage and shock as a result of injuries to vital organs, which were ante mortem in nature and sufficient to cause death in the ordinary course of nature.

Shingara Singh Inspector, PW-2 had prepared report under Section 173 Cr.P.C. Hemant Singh PW-3 had prepared scaled site plan Ex.PE. Shidan Singh SI PW-4 recorded formal FIR Ex.PG after receipt of statement Ex.PF recorded by Charanjit Singh SI.

Lavkesh Kumar appeared as PW-5. This witness in the Court reiterated what was stated in the FIR. However, he also made an improvement that accused also gave fist and leg blows in his abdomen. This witness was also confronted with his previous statement Ex.PF. The confrontations to the previous statement are not very material.

Subhash Bansal PW-6 is a neighbour. He is also an eye witness. He corroborated the testimony of PW-5 Lovkesh Kumar.

Dharam Pal Constable PW-7 had carried special report to the Illaqua Magistrate. Charanjit Lal SI PW-8 proved recording of the statement Ex.PF, preparation of inquest report Ex.PC and rough site plan Ex.PH. The Investigating Officer in cross examination, admitted that there was no history of enmity or ill will between the accused and the complainant party. He further stated that he is not in a position to state whether Bharat Bhushan and Kashmiri Lal were present at the time and place of occurrence. However, photocopy of the statement of Bharat Bhushan recorded during the investigation of the case was supplied to the defence counsel on the application made by the defence counsel.

Both accused were arrested on 3<sup>rd</sup> June, 1998. Thereafter statement of the accused under Section 313 Cr.P.C. was recorded.

Accused Deepak pleaded alibi, Bobby alias Satish denied all the incriminating circumstances, however, admitted his presence and gave the following version:

*"I am innocent. Sushil brother of Lovkesh came on scooter on 30.5.1998 at 5.00 P.M. who parked his scooter in the middle of the street of shops of the market. I am engaged in the job of making video film. I came on scooter. At that time Bharat Bhushan was taking household goods from a confectionery shop in the market near the shop of Lovkesh. I said, street is narrow-passage has been closed-whose scooter is this-atleast the scooter ought to have been parked in the side so that there is no inconvenience to the passers-by. Thereupon Sushil Kumar came out of the shop of Lovkesh who got enraged and said "Who are you to say this thing" and he gave a slap to me. I applied stand to my scooter and wanted to go towards. In the meantime, Sushil ran after turning back and struck with the handle of the scooter and then struck with the cycle which was lying stationed nearby*

*and cycle fell down and Sushil Kumar fell upon the cycle. His forehead struck with the earth. Paddle of the cycle hit his abdomen near chest and he cried 'Haye Mar Gaya' and he became unconscious. Lovkesh was not present at the shop at that time and his servant had brought him and then he was taken to the hospital. I have been falsely implicated in the case."*

In defence, accused examined R.K. Bhardwaj, Chief Editor, Rama Times, Sirsa as DW-1. He proved news item Ex.DD. This news item was brought on record to impeach credibility of Dr.Joginder Singh PW-1. Ram Sarup DW-2 testified regarding alibi of Deepak. Bharat Bhushan DW-3 stated that he had witnessed the occurrence and supported the version divulged by accused Satish alias Bobby in his statement recorded under Section 313 Cr.P.C.

In the present case, occurrence had taken place on 30<sup>th</sup> May, 1998 at 6.00 p.m. Statement of Lavkesh Kumar was recorded on the same day at 8.40 p.m. Case was registered at 9.05 p.m. and the special report reached on the night intervening 30<sup>th</sup> and 31<sup>st</sup> May, 1998 at 12.00 midnight. The trial Court, taking into consideration that there was no previous enmity or ill will between the parties, acquitted the accused for offence under Section 302 IPC but convicted them for offence punishable under Section 304 Part-II IPC. During course of arguments Mr. Sudhir Sharma, appearing for the appellants, has formulated following two questions for consideration of this Court:

1. Whether the version narrated by accused Satish Kumar alias Bobby is truthful or the version narrated by PW-5 Lavkesh Kumar and PW-6 Subhash Bansal aspires confidence ?

2. Secondly, whether both the accused had participated in the occurrence or Deepak has been falsely implicated ?

The Investigating Officer had not specifically admitted that he had recorded the statement of Bharat Bhushan, however, a gist of statement of Bharat Bhushan recorded in the case diary was put to the Investigating Officer. Section 172(2) Cr.P.C. states that any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Section 172(3) Cr.P.C. further states as under:

*“(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145 as the case may be, of the Indian Evidence Act, 1872, (1 of 1872) shall apply.”*

The statement of Bharat Bhushan was not brought on record. After showing the gist of the statement of Bharat Bhushan, Investigating Officer was not asked to refresh his memory. Therefore, it cannot be said with certainty that Bharat Bhushan was witness of the occurrence. Subhash Bansal PW-6 is a neighbour. He is an independent witness. He has no animus against the accused. Therefore, the Court cannot ignore the testimony of PW-6 Subhash Bansal, who stated that both the accused had participated.

In the present case, occurrence took place in May 1998. About 12 years are going to elapse. Appellants have already suffered

mental pain and agony of protracted trial. This Court cannot become oblivious of the fact that the appellants were not armed with any weapon. Their intention may have been to retaliate to the slap given by Sushil and they intended to give beating to Sushil Kumar. Therefore, the appellants have been rightly convicted for offence under Section 304 IPC. However, taking into consideration the fact that appellants were not armed with any weapon and they have suffered mental pain and agony of protracted trial, this Court is of the view that ends of justice will be fully met in case sentence awarded upon the appellants is reduced from seven years rigorous imprisonment to three years rigorous imprisonment.

With the modifications in sentence noticed above, both, Criminal Appeal No.934-SB of 1999 and Criminal Revision No.350 of 2000, are disposed of.

**[KANWALJIT SINGH AHLUWALIA]**  
**JUDGE**

**February 8, 2010**  
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